No. 12401

In The United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,*

vs.

FOSTER TRANSFER COMPANY, a corporation, *Appellee.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

MAXWELL, JONES & MERRITT,
Attorneys for Appellee.

4454 Stuart Building,
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

No. 12401

In The United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*,

vs.

FOSTER TRANSFER COMPANY, a corporation, *Appellee*.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

MAXWELL, JONES & MERRITT,
Attorneys for Appellee.
4454 Stuart Building,
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

TABLE OF CASES

TEXTBOOKS

In The United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*, vs. FOSTER TRANSFER COMPANY, a corporation, *Appellee*.	No. 12401

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

JURISDICTION

Appellee adopts the statement on jurisdiction set out in appellant's brief.

STATEMENT OF THE CASE

On June 26, 1945, the United States Treasury Department, Procurement Division, entered into a written contract with the Foster Transfer Company, a Washington Corporation, appellee herein. Under the terms of the contract, the appellee agreed to perform drayage, packing and crating services for the appellant. The contract is to be found beginning on page 24 of Exhibit A-6.

Appellee began performing under the contract on or about July 1, 1945. Appellee's representative, on or about August 28th, 1945, called upon Messrs.

Street and Clark, representatives of the Treasury Department, Procurement Division, with reference to experience of appellee under the contract. This conference was held at the request of appellee. At this meeting, representatives of the department, mentioned to appellee certain suggestions to assist the company in carrying out the contract, and Mr. Clark, one of the representatives, and Mr. Doolittle, of the company, worked out a program for "the company to follow" (Tr. 69-70-71-72 and 73).

On or about September 26th, Mr. H. L. Doolittle, a representative of the appellee, called upon appellant and talked with Mr. William D. Ihlanfeldt, Regional Director, for the purpose of trying to work out an adjustment in the contract rates, for the handling and hauling of small items of household goods aggregating less than 1,000 pounds. The appellee's experience had been that in these instances, its personnel and equipment were tied up, waiting for the convenience of Government employees, whose household goods were to be moved, thus resulting in loss of time for which no compensation was allowed under the contract (Exhibit A-5).

In December 1945, the Treasury Department Procurement Division, contemplated moving Government owned equipment from the warehouse at 3402 Wallingford Avenue, to the warehouse at 1518 First Avenue South in Seattle, and issued a bid invitation. Appellee, upon learning of this, protested to the Procurement Division, that this move was covered by appellee's contract (Tr. 213). Under date of December 14th, 1945, the Treasury Department, Procurement

Division, addressed a letter to appellee, stating in part:

> "It was not contemplated that movements requiring the furnishing of special facilities such as lift jacks, flats, loading tractors and similar equipment would fall within the contract; such moves being susceptible of detailed specifications to be covered by special invitations to bid, such as our Tllrp-46-104. Nonetheless, the U. S. Treasury Department is considering your offer to handle the move under Contract Tllrp-156, provided the government's interests are definitely protected by assurance that the inventory (approximately $250,000) can be moved within a stipulated period, 7 working days from date of starting, at a reasonable cost." (Tr. 211)

Appellant finally decided to handle the move from Wallingford Avenue to the warehouse on First Avenue under appellee's contract. At no time during the period appellant had under consideration whether this job should be handled under appellee's contract or a separate contract, did the appellant raise any objection, or complaint of the services rendered by the appellee (Tr. 250 and 251). Mr. Street, representing appellant, admitted that at no time during the conversation and correspondence between appellant and the Appellee, was any mention made by Appellants that Appellee was not qualified to do this work or that its performance under the contract here in question was, or had ever been, unsatisfactory (Tr. 252).

Thereafter by letter dated February 20th, 1946, the Appellee was notified that the Government was cancelling the contract effective as of the close of busi-

ness February 28, 1946 (Exhibit 2). The Government rested its right to cancel upon Section 21 of the Special Conditions of the Contract, to-wit:

> "21. The Government reserves the right to cancel the contract at any time for what may be deemed good and sufficient cause."

Thereafter Appellee brought this action alleging it had faithfully performed under the contract and that the action of the Government had been wrongful, arbitrary and without cause and that as a result Appellee had been deprived of its profits for the unexpired portion of the contract in the amount of $5,000.00 (Tr. 2, 3 and 4).

Appellant in its answer admitted the existence of the contract and that the court had jurisdiction but denied all other allegations. By affirmative defense the appellant alleged: (1) The award and execution of contract No. Tllrp-156, with the plaintiff, (2) That the contract provided that the Government could cancel the same at any time for what may be deemed good and sufficient cause, (3) That Article III of the general provision of the contract provided:

> "3. DISPUTES.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the Secretary of the Treasury or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime the contractor shall diligently proceed with performance."

(4) That the contract had been cancelled by the Gov-

ernment for good and sufficient cause, after which the plaintiff or appellee had taken an appeal to the Treasury Department and, (5) that the Secretary of the Treasury had sustained the action of the contracting officer in cancelling the contract.

Appellee by reply admitted the execution of the contract. (2) The provision reserving to the Government the right to cancel, but denied that contract contained a provision for an appeal to the Secretary of Treasury and further denied that the contract had been cancelled for just cause.

At the trial, Mr. L. H. Doolittle, President of the appellee corporation testified with reference to damages sustained by the corporation, because of the wrongful cancellation of the contract. The trial judge interrupted the examination of the witness to inquire whether or not the appellee had committed itself to any expenses which could not be terminated within the time allowed, between the receipt of the notice of cancellation and the effective date thereof (Tr. 62, 63, 64 and 65).

The trial judge in his oral decision (Tr. 295, 296) and in the Findings of Fact (Tr. 12, 13, 14) found that the appellant, through the Regional Director for Region 11, Treasury Department, Procurement Division "for just cause, by letter of February 20, 1946" mailed to the plaintiff, "cancelled said contract No. Tllrp-156, effective February 28, 1946" and "that the period of time granted by defendant before the taking effect of the cancellation was unreasonable under the circumstances in that it did not extend suf-

ficient time to protect itself against certain fixed expenses necessarily incurred to enable it to perform its contract with the defendant." The trial court further found that because of the unreasonably short notice, Appellee had been damaged in the sum of $1,500.00. Judgment was entered for this amount.

QUESTIONS RAISED

1. Where a contract reserved to one party the right to "cancel the contract at any time for what may be deemed good and sufficient cause," is reasonable notice of cancellation or intention to cancel the contract necessary?

2. Where the plaintiff prays for damages for loss of profits, is it error for the trial court to interrogate a witness who was testifying as to the damages on continuing items of expense paid and incurred to carry out a contract which was terminated without reasonable notice?

ARGUMENT

Appellant's Specification of Error No. 1

Summary

Section 21 of the Special Conditions of the contract is indefinite and uncertain. The contract is therefore ambiguous in respect to its duration and termination. The intent of the parties is to be determined. The contract was one for an indefinite period. Where the parties fail to provide a time for notice of intention to terminate, a reasonable time is implied. The trial court did not err in holding the Government was required to give a reasonable notice before terminating the contract.

Argument

The fallacy of the appellant's argument rests upon the assumption that Section 21 of the Special Conditions of the contract is definite and certain, that the contract is not ambiguous and that the trial court committed error by deciding that a reasonable notice of intention to terminate it was not required or ever intended by the parties.

This assumption on the part of the Government's counsel is not supported by the testimony of William D. Ihlanfeldt, manager of the Federal Bureau of Supply and Regional Director for the Treasury Department, Procurement Division. He testified that consideration was given to the need for notice (Tr. 268). The Government gave only six or seven days' notice which the trial court properly held to be unreasonable.

The contractual provisions for termination for good

cause has been before the courts. The rule in reference thereto is tersely stated in 12 Am. Jur., Contracts, Sc. 434 (page 1014) to-wit:

> "A question of interpretation sometimes arises when the right to rescind is not given absolutely but for some specified cause. Such question has arisen with respect to the right to revoke for *good cause*. The requirement of 'good cause' as something on which the right to revoke by one or the other should depend has been declared to be too vague to be fairly intelligible. In such a connection it has not such a distinct sense as to furnish a common an intelligible criterion for the parties, or any definite sense whatsoever. It is impossible to say that the will of the parties concurred and that each meant exactly what the other did, or even to say what either meant. The room for difference of opinion is immense, and the case is one where the parties have failed to express themselves in terms capable of being reduced to lawful certainty by judicial effort. The legal consequence of prescribing such a ground of revocation is that as the passage in question is ineffective on account of its radical uncertainty, there is nothing to detract from the exercise of the right of revocation at any time for cause assigned in good faith." (Emphasis supplied)

See also *Wilcox & G. Sewing Machine Company v. Ewing*, 141 U.S. 627, 35 L. ed. 882, 12 S. Ct. 94; *Cummer v. Bucks*, 40 Mich. 322, 29 Am. Rep. 530.

Obviously Section 21 of the Special Conditions of the Contract here in question, is indefinite and uncertain. It is ambiguous. Resort must be had to the considerations before the parties when the contract

was entered. The trial court saw and heard all of the witnesses and properly held that the right to cancel could be exercised on reasonable notice.

Where the language of a contract with respect to its duration or termination lacks precision, a question of interpretation arises 12 Am. Jur. Contracts, Section 305. The contract here was one for an indefinite time up to one year. Being indefinite as to termination, the only reasonable intention that can be imputed is that the contract may be terminated by the party entitled to terminate it giving to the other party a reasonable notice of his intention to do so (12 Am. Jur. Contracts, Sec. 305).

The record shows that during the seven months the contract was in effect, Appellee handled between twelve and fourteen hundred jobs (Tr. 184). Appellee initiated two conferences with appellant. The first on August 28, 1945, because its equipment and men were tied up awaiting the convenience of Government employees, after appellee had reported at the time and place ordered (Tr. 70, 72). The second on September 26, 1945, in an effort to get a rate adjustment for handling small items of household goods aggregating less than 1,000 pounds (Tr. 76, 77, 269). At these conferences initiated by Appellee, Appellant, in its confirming letters and in general terms indicated that some complaints had been made against Appellee's services. These two conferences were confirmed by Appellant's letters introduced as defendant's Exhibits A-4 and A-5, respectively. It is worthy of note that on February 19, Mr. Street, Acting Chief, Purchase & Supply Division, who was instrumental in

bringing about the termination of the contract, wrote a "memorandum addressed to: The Record." In this self-serving report, indubitably written for the purpose of rationalizing the termination of the contract, Mr. Street says:

> "Although these agencies have reported these unsatisfactory conditions by telephone, very few have felt inclined to present written data for the record, although some have done so, as for example, the Office of Surplus Property and the Fish and Wildlife Service, whose letters are self explanatory and now in the files." (Tr. 230)

The alleged complaints were certainly not material if no written reports were made. It is not unreasonable to assume that Mr. Street on February 19, 1946, solicited complaints. This witness was unwilling to deny that he had asked Mr. L. H. Doolittle to absorb demurrage on a shipment that had occurred because of Mr. Street's default (Tr. 247-248). His self-serving reports must be considered in the light of the whole record.

In December 1945, the appellee contacted the Government with reference to a proposed move of Government equipment from the warehouse 4402 Wallingford Avenue to the warehouse at 1518 First Avenue, Seattle. It appears that the Government was then considering letting this move on separate contract and that the appellee asserted that the move was to be covered by the contract which he had with the Government. During these discussions, the Government representatives made no complaints to Appellee regarding the services rendered by Appellee under this contract. It was the Government's position that they

had not originally intended that such move as the one under consideration would be covered by the Appellee's contract (Tr. 211, 264). No complaints were received by the Appellee after the Wallingford job was completed.

On February 21st, 1946, the Appellee received notice from the Treasury Department, Procurement Division, cancelling his contract effective February 28, 1946.

These facts and considerations were all before the trial court who heard the witnesses and undoubtedly considered that while the Government had the right to terminate the contract in accordance with the reservation contained in the agreement, this right could only be exercised upon reasonable notice to the Appellee.

ARGUMENT

Appellant's Specification of Errors Nos. 2 and 3

Summary

The Appellant failed to object to the questions asked by the trial court and after the questions had been answered at no time moved to strike the answers. Appellant's contention that the questions by the trial judge introduced a new issue is incorrect. Furthermore, Appellant's contention that the parol evidence rule was violated by the court's questions relating to damages is obviously erroneous. The parol evidence rule is not applicable and cannot be invoked to preclude proof of damages.

Argument

Assuming for the purpose of this argument that the questions by the trial court and the answer solicited did relate to special damages, then the defendant waived the rule requiring the pleading of special damages and is deemed to have done so by his failure to object to the trial court's questions or to move to strike questions and answers after the same were in the record. The rule is tersely stated in 15 Am. Jur., Damages, Sec. 306, as follows:

> "The defendant may waive the rule requiring special damages to be alleged, however, and will be deemed to have done so where evidence to furnish a basis for the recovery of such damages is admitted without objection. Undoubtedly, a plaintiff will, when objection is made to the introduction of evidence of special damages on the ground that they have not been pleaded, be permitted to amend his pleadings so as to embrace claims therefor. An objection that the allegations of a pleading are insufficient to cover special damages, when made after verdict, is too late."

Parol evidence rule:

Counsel for appellant erroneously argues that the parol evidence rule was violated by questions propounded by the trial court relative to specific items of damage suffered by Appellee. The contract contains no clause for liquidated damages. The parol evidence rule has no application to the case at bar. If counsel's contention were correct it would be impossible to prove damages in any case arising out of a breach or wrongful termination of a contract.

ARGUMENT

Appellant's Specification of Error No. 4

SUMMARY

The contract here in question provided for an appeal to the Secretary of the Treasury on all disputes concerning questions of fact arising under the contract. The basis of Appellee's claim arises not out of a dispute of fact but is predicated upon a question of law; namely, the failure of the appellant to give reasonable notice before seeking a termination of the contract. The Secretary of the Treasury correctly held that under the circumstances in this case, Paragraph 3 of the General Provisions of the contract was not applicable.

Argument

General Provision 3 of the contract provided:

> "3. *Disputes*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the Secretary of the Treasury or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. In the meantime, the contractor shall diligently proceed with performance."

Appellee did appeal the action of the Procurement Division in terminating the contract. The Secretary of the Treasury, although rendering a decision upholding the contracting officer, in his reply to the Appellee herein, stated:

> "Inasmuch as Procurement Regulations No. 3 were issued by the War Department, they have no application to contracts awarded by this Department and, accordingly, will not be considered in the decision on such appeal." (See Page 1, Defendant's Exh. A-6)

Counsel for the Government cites in support of his contention the case of *U. S. v. Moorman*, Case No. 97, October Term 1949, decided January 9, 1950 (not yet published in bound volume).

This case has no application to the question presented for consideration of the court in this instance. In the *Moorman* case, a question of fact was presented. In the principal case, the trial court was called upon to decide a question of law. The instant case therefore presents not a question of fact upon which Appellee is seeking a "second guess" as Appellant contends. Appellee is merely urging that the trial court did not err in holding that under the circumstances here, the Government must respond in damages because of its failure to give Appellant reasonable notice of its intent to cancel the contract.

CONCLUSION

The trial judge heard the witnesses, considered all of the circumstances, and found the contract to be ambiguous. He then resorted to the rule that where the contract provided no time for giving of notice, that a reasonable time would be implied. He found that the Government in this case had not given to Appellee reasonable notice of its intention to terminate the contract; that Appellee had suffered damages in the amount of $1500.00 for expenses incurred by Appellee in order to permit it to execute and carry out its obligations under the contract. There is ample evidence in the record to sustain the findings of the trial court. The judgment entered herein for Appellee should be sustained.

Respectfully submitted,

MAXWELL, JONES & MERRITT,
Attorneys for Appellee.